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## FEDERAL POLLUTION CONTROL: PARTICIPATION BY STATES AND INDIVIDUALS ENHANCES THE NATIONAL POLLUTION CONTROL EFFORT

### I. INTRODUCTION

In recent years, efforts to abolish air and water pollution have been steadily increasing. The private citizen effort has increased through the establishment of many new citizens' groups which have joined older, more established conservationist organizations. In addition, the public sector, through federal, state, and local governments, has stepped up the pace of its anti-pollution attack by enacting new legislation, creating new enforcement mechanisms, and establishing new anti-pollution policies. On the federal level this effort has resulted in the enactment of extensive legislation establishing national policies for the abatement of air and water pollution.<sup>1</sup> It is the purpose of this Comment to examine the important federal acts in order to show the manner in which the federal government directly attacks pollution and the areas in which its attack is only indirect through cooperation with state and local anti-pollution efforts. It will also consider the federal avenues available to private citizens and citizens' groups through which they may influence basic anti-pollution policy decisions, assure public enforcement of existing law, or take an active personal role in the enforcement of existing law or the promotion of existing federal policies.

### II. AIR POLLUTION

#### *A. Pre 1970 Federal Legislation*

In order to protect and enhance the quality of air resources and thereby promote the public health and welfare,<sup>2</sup> Congress enacted the Clean Air Act.<sup>3</sup> This Act required the Secretary of Health, Education, and Welfare to designate air quality control regions and to issue air quality

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1. Initial federal entrance into the field of pollution control was, to say the least, inauspicious. The first legislation was intended merely to promote research, and it provided only \$186,000 for that purpose. Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955). Since that time, however, the problem has reached such proportions that more recent legislation actively involves the federal government in abatement activity, and congressional power to closely regulate air pollution has been upheld by the federal courts. *See, e.g.,* United States v. Bishop Processing Co., 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

2. 42 U.S.C. § 1857 (Supp. V, 1970).

3. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963). The purpose of air pollution legislation has remained the same since that time, but the legislation has undergone significant amendment. In 1967 it was amended to include the Air Quality Act which, for the first time, involved the federal government in active abatement activity. 42 U.S.C. § 1857 (Supp. II, 1967). The most recent amendments to this legislation appear in 1970 Amendments to the Clean Air Act, 1970 U.S. CODE CONG. & AD. NEWS 6910-56.

criteria to the states within such regions.<sup>4</sup> Once such regions and criteria were designated, the Secretary was authorized to adopt, consistent with the air quality criteria, air quality standards and plans for the implementation thereof<sup>5</sup> for the states. The air quality standards could be adopted through two different procedures. First, if the governor of a state filed a letter within ninety days after receipt of the air quality criteria showing the state's intent to adopt air quality standards within one-hundred eighty days and to hold public hearings thereon prior to such adoption, and if the state adopted a plan for the implementation, maintenance, and enforcement of the standards within one-hundred eighty days after their adoption, the standards and plan were to be those officially applicable to the state, but only if they were found to be consistent with the air quality criteria and recommended control techniques formerly issued. It was also necessary that there be assurance of achieving the air quality standards within a reasonable time, and that there be a means of enforcement by state action, including authority for the state agency to request suit to immediately enjoin pollution which endangered health.<sup>6</sup> If a state failed to file a letter of intent or to establish air quality standards as aforementioned, the Secretary was authorized, after reasonable notice to, and a conference with, appropriate federal, interstate, state, municipal, and industry representatives, to prepare proposed regulations establishing standards. The proposed standards would become applicable to the state if the state failed to adopt its own appropriate standards within six months after the Secretary's standards were proposed.<sup>7</sup> If, within thirty days after the proposed standards were officially adopted, the governor of the state petitioned the Secretary for a public hearing, such hearing was to be held before a five member hearing board which was to receive testimony from state and local pollution control agencies and from other interested parties affected by the standards and make findings as to whether the Secretary's standards should be approved or modified.<sup>8</sup>

Thus, with respect to the establishment of air quality standards and plans for their implementation, it was contemplated that there would be a high degree of federal-state cooperation. Federal authority to establish such standards and plans was to be exercised only if a state failed to act; and even when such authority was exercised, provision was made for the state to have an opportunity to establish its own requirements. However, notwithstanding the hearing requirement, there was no provision explicitly requiring citizen participation in the determination of adequate standards and plans thus, raising the inference that little or no such participation was intended.

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4. 42 U.S.C. § 1857c(2)(a), (b) (Supp. V, 1970). The secretary is also required to provide information regarding recommended control techniques. 42 U.S.C. § 1857c(2)(c) (Supp. V, 1970).

5. 42 U.S.C. § 1857d (Supp. V, 1970).

6. 42 U.S.C. § 1857d(c)(1) (Supp. V, 1970).

7. 42 U.S.C. § 1857d(c)(2) (Supp. V, 1970).

8. 42 U.S.C. § 1857d(c)(3) (Supp. V, 1970).

Once the air quality standards and implementation plans were established, their enforcement was placed almost entirely in the hands of state authorities; federal action was, for the most part, contingent on state inaction. If the Secretary, through studies, reports, or surveys, found that air quality in a particular region was below the air quality standards for that region, and that a state had failed to take reasonable enforcement action, he was first required to give notice of the violation to the state or states involved, those contributing to the violations, and other interested parties.<sup>9</sup> If the failure to enforce did not cease within one-hundred eighty days of the notification and the pollution endangered health or welfare in a state other than the one in which the pollution originated — *i.e.*, interstate pollution — the Secretary was authorized to request that the Attorney General bring a federal court action for abatement.<sup>10</sup> If the pollution endangered only those within the state in which it originated — *i.e.*, intrastate pollution — the Secretary was authorized only to provide assistance to the state in judicial proceedings brought by the state to secure abatement.<sup>11</sup>

Where there was air pollution endangering the health of any person yet no discovered failure to enforce by the state, the procedure for federal entrance into enforcement of air quality standards placed primary reliance on the states and provided for action by the Secretary only after cumbersome steps were taken. The first step required was a conference with interstate, state, and local control agencies which could be convened at the request of any state governor, air pollution control agency, or municipality concerned with pollution endangering health.<sup>12</sup> In the case of interstate pollution, the conference could also be called at the insistence of the Secretary after consultation with state officials.<sup>13</sup> Following the conference, the Secretary was required to report the occurrence of abatable pollution and the adequacy of the abatement measures already taken;<sup>14</sup> if he believed that progress towards abatement was inadequate, he was required to recommend necessary remedial action to the appropriate control agencies and allow six months for the taking of such action.<sup>15</sup> The absence of proper remedial action within the six month period resulted in a public hearing in the area of the discharge site.<sup>16</sup> All interested parties were to have an opportunity to present evidence,<sup>17</sup> and the hearing board was to make findings as to whether (1) pollution endangering health was occurring and (2) effective progress toward abatement was being made.<sup>18</sup> The hearing board was also required to recommend rea-

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9. 42 U.S.C. § 1857d(c) (4) (Supp. V, 1970).

10. 42 U.S.C. § 1857d(c) (4) (i) (Supp. V, 1970).

11. 42 U.S.C. § 1857d(c) (4) (ii) (Supp. V, 1970).

12. 42 U.S.C. § 1857d(d) (1) (A), (B) (Supp. V, 1970).

13. 42 U.S.C. § 1857d(d) (1) (C) (Supp. V, 1970).

14. 42 U.S.C. § 1857d(d) (3) (Supp. V, 1970).

15. 42 U.S.C. § 1857d(e) (Supp. V, 1970).

16. 42 U.S.C. § 1857d(f) (1) (Supp. V, 1970).

17. 42 U.S.C. § 1857d(f) (1) (Supp. V, 1970).

18. 42 U.S.C. § 1857d(f) (2) (Supp. V, 1970).

sonable abatement measures to the Secretary.<sup>19</sup> Thereafter, the Secretary was required to send the findings and recommendations to the polluters along with notice of a reasonable time, at least six months, within which to secure abatement.<sup>20</sup> If reasonable abatement action was not taken within the specified time period and the pollution was interstate, *then* the Secretary was authorized to request the Attorney General to bring a court action for abatement.<sup>21</sup> In the case of intrastate pollution, the Secretary was required to either seek such action or to supply assistance in state enforcement actions only upon the request of the state governor.<sup>22</sup>

The only other opportunity through which the federal government could become involved in seeking abatement of pollution arose when particular pollution presented an imminent and substantial danger to health against which state authorities had not moved for abatement.<sup>23</sup> In such a case, the Secretary was authorized to request the Attorney General to bring suit to immediately enjoin any contributor to the pollution from emitting the contaminants causing it.<sup>24</sup>

It is apparent, therefore, that primary reliance for the enforcement of anti-pollution requirements was placed on state governments. Only indirect federal action was provided for, and such could be taken only after the state had been afforded full cooperation and an extended opportunity to enforce the anti-pollution requirements. Indeed, federal authorities could act without delay only where the pollution in question presented an imminent and substantial danger to health. It is also apparent that the private citizen's role in enforcement was intended to be minimal. Indeed, the only enforcement action such citizens could take was that of informing, or complaining to, the appropriate public officials.

## *B. 1970 Amendments to the Federal Legislation*

### *1. Introduction*

In 1970, Congress substantially amended the legislation referred to in the preceding subsection. It also adopted a reorganization plan which placed the responsibilities for administering the air pollution enforcement program, along with other environmental protection enforcement programs, in the hands of the Administrator of a newly created Environmental Protection Agency. As a result of this reorganization, any danger that another department's primary mission might interfere with objectivity in the anti-pollution effort was substantially eliminated by the creation of an independent agency which can function as an impartial arbiter in the environmental area. In making its changes in the air quality legislation, Congress significantly changed much of the focus and posture which the

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19. 42 U.S.C. § 1857d(f)(2) (Supp. V, 1970).

20. 42 U.S.C. § 1857d(f)(3) (Supp. V, 1970).

21. 42 U.S.C. § 1857d(g)(1) (Supp. V, 1970).

22. 42 U.S.C. § 1857d(g)(1) (Supp. V, 1970).

23. 42 U.S.C. § 1857d(k) (Supp. V, 1970).

24. 42 U.S.C. § 1857(k) (Supp. V, 1970).

earlier legislation had established with respect to federal-state cooperation in establishment and enforcement of federal anti-pollution requirements and with respect to the role of private citizens in enforcing the requirements. In addition, the significance and scope of the federal anti-pollution policy is broadened through the existence of new requirements. While these changes are of great importance, other aspects of the federal approach have not been altered. Accordingly, it will be the purpose of this subsection to analyze both the important changes and the significant absence of change in the air quality legislation and thereby arrive at a conclusion regarding the merit of the federal policy as it now exists.

## 2. *Air Quality Standards*

The Administrator of the Environmental Protection Agency is required to publish proposed air quality standards and to promulgate such proposals as the effective national standards after allowing a reasonable time, not exceeding ninety days, for comment by interested parties.<sup>25</sup> This procedure envisions a significant decrease in state control over the establishment of air quality standards. The only opportunity for state influence is through comment on the initial proposals. Since the elimination of state control is so broad, a question is raised as to which level of government should play the dominant role in standard setting.

It could be argued that state and local agencies should bear primary responsibility because the standards are applicable on a regional basis and, therefore, those most familiar with local peculiarities should play a dominant role. However, the contemplated standards are intended to be *national minimums* and not local requirements thus, seeming to indicate that the national government should be the dominant factor. Such a federal dominance should not affect the extent to which states are able to assure cognizance of local peculiarities since they can point these out in commentary on the initial proposals. Under this approach, federal dominance would not seem to reduce the efficacy of air quality standards.

Similarly, while it could be argued that the establishment of national minimums restricts the ability of local authorities to set forth stringent standards, this argument is unpersuasive because the amendments *do not preclude states from setting their own standards*; they simply assure that any such state standards will not be so relaxed as to permit air quality to decrease to such an extent that it is below a required minimum. If states were precluded from setting their own standards, the result would not necessarily be particularly onerous because nationally established requirements are apt to be responsive to the broad social needs of the region to which they are applicable. The contrary might be true if standards were locally established because pressure from local industries to which local officials may be politically sensitive could result in the granting of

25. 1970 Amendments to the Clean Air Act § 109, 1970 U.S. CODE CONG. & AD. NEWS at 6914-15 [hereinafter cited as 1970 Amendments].

variances, delays, or exceptions which are contrary to broad social needs. Thus, the movement toward more federal and less state control over standard setting would appear to be a movement in the right direction.

### 3. *Implementation Plans*

The procedure for the adoption of implementation plans has been more clearly defined under the new amendments. Prior to the adoption of such a plan, a state is required to hold public hearings with respect thereto. After the plan is adopted, it must be submitted to the Administrator. All this must take place within nine months after the promulgation of air quality standards.<sup>26</sup> Thereafter, the Administrator is required to review the plans for certain listed requirements and approve or disapprove them.<sup>27</sup> If a state's plan does not meet the federal requirements or if a state fails to submit a plan, the Administrator is authorized to promulgate one himself,<sup>28</sup> and if the state fails to hold public hearings in connection with the adoption of its plan, the Administrator is required to hold such hearings in the region for which the plan is to be applicable.<sup>29</sup>

It is apparent that this procedure relies primarily on the states to adopt plans for the implementation, maintenance, and enforcement of air quality standards. While it could be argued that such reliance is misplaced because of the same pitfalls extant in permitting state control over standard setting, it would seem that since the effectiveness of such plans is subject to ultimate approval of the Administrator and since there are specific requirements which must be met in order for such approval to be granted, there is sufficient federal influence to guarantee avoidance of these problems and adoption of plans adequately structured for the implementation of federal air quality standards. This level of federal-state cooperation would seem to be the most desirable because it leaves the states free to develop the programs they deem necessary to meet their individual anti-pollution needs, and at the same time it provides assurance that certain minimum requirements will be met. Thus, the optimum level of state flexibility concomitant with federal control is obtained under the present procedure for adopting implementation plans.

It is also apparent that the new procedure for adopting implementation plans leaves room for some measure of citizen participation. This opportunity is available through the public hearings required prior to the adoption of regional standards. While there is no specific requirement that citizens be heard at these hearings, the requirement that the hearings be open to the public would seem to assure some measure of participation. The influence which citizens might have, however, is questionable because there are no requirements as to the weight to be given to citizens' testi-

26. 1970 Amendments § 110(a)(1), 1970 U.S. CODE CONG. & AD. NEWS at 6915.

27. 1970 Amendments § 110(a)(2)(A)-(H), 1970 U.S. CODE CONG. & AD. NEWS at 6915-16.

28. 1970 Amendments § 110(c), 1970 U.S. CODE CONG. & AD. NEWS at 6917.

29. *Id.*

mony and because there are no guidelines as to the proper balancing of public interests with industry and government interests. States are thus free to disregard entirely citizen recommendations<sup>30</sup> or to schedule citizen and industry testimony in such a way as to give the impression that the plans are the exclusive concern of industry or agency personnel and beyond the basic concern of the public at large.<sup>31</sup>

Furthermore, there would seem to be some question as to whether citizens will be notified in such a manner as to assure the most meaningful participation possible in plan adoption. There is no reasonable notice requirement and no specification requirement as to the information that would be necessary to make any notice adequate. Thus, the states would seem to be permitted to publish simply the place, date, time, and general topic of the hearing. This kind of notice would not be sufficient to assure maximum citizen contribution because the function of the hearing is to make specific selections from various options in order to attain a desired goal. Accordingly, it would be necessary for citizens to know the various alternatives available prior to the hearing in order for them to make reasoned judgments concerning the most desirable plan which would obtain the ultimate goals of community planning.<sup>32</sup> Therefore, it is submitted that the states' apparent freedom to give inadequate notice lacking the aforementioned information could operate to diminish the effectiveness of citizen involvement. Moreover, it seems clear that, while the potential for citizen involvement is significantly increased under the new law, the increase is not as great as it could be with the result that the new legislation falls short of full citizen participation with respect to implementation plans.<sup>33</sup>

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30. While it could be argued that states are also free to disregard industry recommendations and base their standards wholly on citizen opinions, prevailing political considerations would seem to indicate that there is greater likelihood that full reliance would be placed on industry testimony. In any event, either approach would seem inconsistent with the requirement that hearings be public since private citizens, their representatives, and industry are part of the public. Thus, it would seem that some weight should be given the testimony of each element and that the federal legislation should have provided some assurance through guidelines indicating what weight should be accorded citizen views.

31. This was the result in the standards hearings held in Cincinnati in 1969 as required under the old act, by delaying the citizen testimony until the end of the hearings and thereby diminishing the citizen role to one of angry protest. *Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 2, at 465-66 (1970) [hereinafter cited as *Hearings*]. A similar situation arose in St. Louis where extensive hearings were conducted in which citizen testimony was taken and later ignored. *Id.*, pt. 4 at 1481.

32. *Hearings*, *supra* note 31, at 466.

33. It is assumed that individual citizens would be interested in taking part in the decision making process. Even making this assumption, however, it could be argued that citizen influence in basic anti-pollution decisions should be minimal and that, therefore, the aforementioned limits on the ability of individual citizens to participate effectively are appropriate. It would seem that individuals are not educationally or financially able to provide the kind of empirical technical evidence that would be necessary in order for their contribution to be worthwhile; therefore, the argument that only citizens' representatives, *i.e.*, local and national conservation or labor groups, should be permitted to participate and that individual participation should be excluded would appear persuasive at first blush. However, in establishing imple-



4. *Added Federal Regulation of Pollution Sources*a. *New Source Standards of Performance*

The new amendments require the Administrator to establish emission performance standards for categories of "new stationary sources"<sup>34</sup> designated by him.<sup>35</sup> In addition, emission standards are to be established for existing sources which emit any pollutant for which air quality criteria have not issued but to which such standards would be applicable were the source a new one.<sup>36</sup> These latter standards may be established through state plans submitted pursuant to a procedure to be adopted by the Administrator,<sup>37</sup> or they may be established by the Administrator if the state fails to submit such a plan.<sup>38</sup> Once the emission performance standards are established for new or already existing sources, it is un-

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mentation plans it is necessary to make determinations on many matters which are social or economic, rather than technical, in nature; thus, the ultimate decisions could result in a myriad of economic or social consequences. For example, extremely stringent enforcement schedules within a plan could be so costly to meet as to threaten industrial manpower cutbacks, to cause industrial departure, or to discourage industrial development in a particular community. On the other hand, overly lax schedules could result in a failure to achieve desirable air quality. In the former situation the possible loss of jobs, local revenue, or population increase could be such that individuals would desire less stringent requirements; in the latter, potential health hazards could be such that individuals would advocate more stringent requirements. Moreover, even if the provisions of a plan were such that neither extreme would arise, less serious effects on individuals might result. While it could be argued that citizens' groups would represent the community's interests and advocate for its general good, this would seem to be insufficient citizen participation because such groups would be apt to view community interests in terms of the particular interests or views of its members which might be different than the desires of non-member individuals. Thus, it would seem that the potential social and economic impact of implementation plans is significant enough to require recognition of the views of individuals regarding their adoption and that testimony by conservationists or unionists may not adequately assure such recognition.

It could also be argued that the government officials making the ultimate decisions will adequately review the broad range of social costs and benefits which will accrue as a result of a particular plan. However, federal bureaucrats have a tendency to be slow to act and to preserve the status quo. For a discussion on these and other problems which arise as a result of reliance on bureaucrats, see Potter, *Progress Means Pollution: An Idea Whose Time Has Come — And Gone*, *Hearings*, *supra* note 31, pt. 4, at 1201-02. Professor James W. Jeans has stated that:

[H]istorically the performance of governmental [regulatory boards] has been open to suspicion. Board members are invariably chosen from the industry over which they serve. . . . There is the inevitable community of interest, common educational background, overlapping circles of friends, and community of relationship . . . hardly optimum conditions to insure impartial justice.

*Hearings*, *supra* note 31, pt. 2, at 828. Under these circumstances, there would seem to be a danger that individuals would look with disfavor upon bureaucratically adopted plans and consider them ill conceived and thus deserving of disrespect. If this is true, it would seem that officialdom should not be relied upon exclusively and that individuals should be permitted full participation in the establishment of implementation plans in order to assure a full review of all possible costs and benefits.

34. A new source is any stationary source, the construction or modification of which is commenced after the publication of regulations prescribing a standard of performance. 1970 Amendments § 111(a)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6919. A stationary source is any building, structure, facility or installation, which emits or may emit any air pollutant. 1970 Amendments § 111(a)(3), 1970 U.S. CODE CONG. & AD. NEWS at 6919.

35. 1970 Amendments § 111(b), 1970 U.S. CODE CONG. & AD. NEWS at 6920.

36. 1970 Amendments § 111(d), 1970 U.S. CODE CONG. & AD. NEWS at 6920-21.

37. 1970 Amendments § 110(d), 1970 U.S. CODE CONG. & AD. NEWS at 6920-21.

38. 1970 Amendments § 111(d), 1970 U.S. CODE CONG. & AD. NEWS at 6920-21.

lawful for any owner or operator of such sources to operate them in violation of the standards.<sup>39</sup>

The provision for a state procedure by which to adopt performance standards would seem to be a desirable inclusion because it will probably be more convenient for operators to seek approval locally than it would be to do so on the federal level. Moreover, since state procedures must meet the minimum federal requirements and since such procedures may be reviewed and suspended if the need arises,<sup>40</sup> there would seem to be no problem with respect to the danger of inadequate procedures at the local level. Thus, it seems that an optimum level of federal-state cooperation has been reached in the provisions regarding the establishment of performance emission standards.<sup>41</sup>

In addition to the above requirements, new source owners and operators are required to keep, make, or install all records, reports, or monitoring equipment necessary to enable the Administrator to determine whether the source is in compliance with the promulgated performance standards. They are further required to permit an agent of the Administrator access to, or copies of, all records, reports, and information reasonably required by the Administrator.<sup>42</sup>

#### *b. National Emission Standards*

Under the 1970 amendments the Administrator is also required to set emission standards for selected air pollution agents, emitted from any stationary source, which are considered "hazardous"<sup>43</sup> and are not the subjects of air quality standards.<sup>44</sup> Owners and operators of such stationary sources may be required to keep all records, make all reports, install all monitoring equipment and provide all information reasonably necessary to enable the Administrator to determine whether the source is in compliance with the emission standards set by him.<sup>45</sup> They must also permit the Administrator or his agents access to such reports, records, equipment, and information.<sup>46</sup> It is unlawful to refuse access or to operate an installation in violation of the emission standards.<sup>47</sup>

39. 1970 Amendments § 111(e), 1970 U.S. CODE CONG. & AD. NEWS at 6921.

40. 1970 Amendments § 111(d)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6921.

41. See p. 832 *supra*.

42. 1970 Amendments § 114(a), 1970 U.S. CODE CONG. & AD. NEWS at 6924-25.

43. 1970 Amendments § 112(a)(1), 1970 U.S. CODE CONG. & AD. NEWS at 6921 states, in pertinent part, that:

The term "hazardous air pollutant" means an air pollutant to which . . . in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

44. Air pollutants which, in the judgment of the Administrator, have an adverse effect on health and welfare and which are present in the air as a result of emission from numerous or diverse mobile or stationary sources are subject to air quality criteria and air quality standards. 1970 Amendments §§ 108(a)(1), 109, 1970 U.S. CODE CONG. & AD. NEWS at 6913.

45. 1970 Amendments § 114, 1970 U.S. CODE CONG. & AD. NEWS at 6924.

46. *Id.*

47. *Id.*

Thus, the federal government's direct control over polluters and over the amount of pollution permitted in the air is greatly increased under the new law. However, there is no attendant increase in the influence private citizens can have over the stringency of the control measures. While there is provision for public hearings with respect to promulgation of the new regulations, it has already been demonstrated that this alone does not adequately provide for citizen participation.<sup>48</sup> Promulgation, therefore, is almost exclusively the Administrator's responsibility. This would seem most unfortunate since the increased regulation will probably have significant social consequences affecting the lives of many individuals who, absent an opportunity to study the various alternatives and express their views regarding the most appropriate one, might conceivably view the regulation with distrust.<sup>49</sup>

## 5. *Enforcing Federal Pollution Regulations*

### a. *Public Enforcement*

The increased federal regulation will be of little value in improving air quality unless adequately enforced. It has already been noted that public enforcement procedures under prior law placed primary reliance on the discretion and efficacy of state agencies.<sup>50</sup> The new amendments alter this emphasis and place primary reliance upon federal enforcement.

Where a polluter violates the emission standards established for selected pollution agents or the performance standards for new pollution sources, the Administrator may order abatement and seek judicial relief in the event of noncompliance with such order, or he may immediately seek a court order for abatement.<sup>51</sup> With respect to the enforcement of implementation plans, the Administrator's power is not quite as broad in that he must always issue an abatement order prior to any court action,<sup>52</sup> and he may issue such order only if the state in question has failed to administer its plan satisfactorily, to provide sufficient funding or personnel to enforce it, or to bring suit to enjoin those causing or contributing to emergency pollution.<sup>53</sup> No prior order to abate the violation of a prohibition against hazardous air pollutants is required, however, and the Administrator can immediately seek a court order against such violations.<sup>54</sup> With respect to violations of any of the various information requirements,<sup>55</sup> the Administrator is authorized to seek appropriate relief from a court.

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48. See notes 30 & 31 and accompanying text *supra*.

49. See note 33 *supra*.

50. See pp. 829-30 *supra*.

51. 1970 Amendments § 113(a) (3), 1970 U.S. CODE CONG. & AD. NEWS at 6923.

52. 1970 Amendments § 113(a), 1970 U.S. CODE CONG. & AD. NEWS at 6922.

53. 1970 Amendments § 113(a) (2), 1970 U.S. CODE CONG. & AD. NEWS at 6923.

54. 1970 Amendments § 113(a) (3), 1970 U.S. CODE CONG. & AD. NEWS at 6923.

55. 1970 Amendments § 114, 1970 U.S. CODE CONG. & AD. NEWS at 6924.

In addition to civil enforcement measures, violators may be subject to severe criminal sanctions.<sup>56</sup> These sanctions are applicable where one knowingly violates any requirement of an applicable implementation plan,<sup>57</sup> fails to comply with any abatement order,<sup>58</sup> violates emission standards for hazardous air pollutants,<sup>59</sup> or violates a new source standard of performance.<sup>60</sup> They are also applicable where one knowingly falsifies or misrepresents any document required to be filed by the Act,<sup>61</sup> but the sanctions available against this latter situation are less severe than those applicable to other violations.<sup>62</sup>

Thus, with the minor exception of implementation plans which are to be enforced by the federal government only upon state inaction, all enforcement action by the public sector is to be taken by the Administrator. This change in policy, no doubt, was prompted by the fact that the majority of states have failed to respond properly to the enforcement problem,<sup>63</sup> although this is not particularly true with respect to Pennsylvania.<sup>64</sup> Even assuming, however, that federal enforcement will be

56. Violators may be fined not more than \$25,000 per day or imprisoned for not more than one year or both. 1970 Amendments § 113(c), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

57. 1970 Amendments § 113(c)(1)(A), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

58. 1970 Amendments § 113(c)(1)(B), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

59. 1970 Amendments § 113(c)(1)(C), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

60. *Id.*

61. 1970 Amendments § 113(c)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

62. The penalty is \$10,000 per day or imprisonment for not more than six months or both, as opposed to the sanctions available against other violations, \$25,000 per day or one year imprisonment or both. 1970 Amendments § 113(c)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6924.

63. Many states have failed to provide adequate civil penalties against air pollution violators. *Hearings, supra* note 31, pt. 4, at 1182. While it could be argued that this shortcoming could be overcome through federal-state cooperation, the failure of states to respond to such cooperation by complying with motor vehicle inspection standards would seem to indicate that such cooperation would not alleviate the problem. *Id.* at 1183. See also Comment, *Air Pollution: The Problem of Motor Vehicle Emissions*, 3 CONN. L. REV. 178 (1970). It could also be argued that the best way to achieve effective air pollution control is through an attack on the local level; however, the trend in the local anti-pollution fight has been the failure by many localities to conduct such a fight. See Comment, *Local Government Action in the Control of Environmental Pollution in the Commonwealth of Pennsylvania*, 16 VILL. L. REV. 895, 896 n.13 (1971). Furthermore, while many states have strict control laws on the books which contain stringent enforcement provisions, their enforcement agencies have not been adequately staffed and, thus, the laws remain unenforced. See *Hearings, supra* note 31, pt. 4, at 1182.

64. See *Hearings, supra* note 31, pt. 4, at 1212-14, 1299-1302. See also Comment, *Statutory Pollution Control in Pennsylvania*, 16 VILL. L. REV. 851 (1971). The Lehigh and York air pollution control regions in Pennsylvania have effectively attacked air pollution problems in their areas. See Comment, *supra* note 63, at 912, 914. The same is true with respect to the Los Angeles, California area. See *Hearings, supra* note 31, pt. 4, at 1364.

Since most states have shown a reluctance to attack the problem, it would seem that local entities should not be relied upon until such time as they demonstrate a willingness to attack the problem vigorously. While it could be argued that such a demonstration would be forthcoming once states realized the extent to which federal policy included them, the likelihood that this is true would seem to be extremely slight. In the first place, it is conceivable that some state government administrations may be politically indebted to particular industrial groups and would probably be

more effective, the possible lack of adequate commitment on the part of the government officials<sup>65</sup> can still leave a vacuum in enforcement. It is thus fortunate that the Congress provided for a form of citizen action to supplement or instigate public enforcement.

*b. Enforcement By Private Citizens*

In order to insure further implementation of federal pollution policy, the new amendments authorize private citizens to initiate civil actions to enforce, or to require the enforcement of, any requirement established under the Act, regardless of the amount in controversy or the parties' citizenship.<sup>66</sup> Provision is made for such suits to be filed, at the claimant's option, against the Administrator for allegedly failing to perform any non-discretionary duty or act established by the Act<sup>67</sup> or against any private or governmental violators of emission standards or abatement orders.<sup>68</sup> Jurisdiction for the suits lies in the federal district courts, and any order necessary to enforce the requirement in question, as well as attorney and expert witness fees, may be granted at the disposition of the case.<sup>69</sup> Thus, the availability of citizen enforcement action is tremendously enhanced under the new amendments. Indeed, the only impediments to such action are requirements that notice of the alleged violation be given to the Administrator and the proper state air pollution control agency and that action be delayed at least sixty days thereafter so that those notified have an opportunity to institute their own abatement action.<sup>70</sup> This sixty-day delay requirement provides only a slight impediment, however, because it does not apply to citizen actions against violations of abatement orders<sup>71</sup> or emission standards for hazardous air pollutants.<sup>72</sup>

The possible approaches an attorney might take to obtain redress for grievances of an environmentalist client against private parties or governmental agencies are almost innumerable. In addition to actions against polluters for reparations for violations of any standard or prohibition established pursuant to the Act, or of any implementation plan, there are many other possibilities. For example, an action to require a state to

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extremely reluctant to attack these interests in an effort to demonstrate their enthusiasm for federal anti-pollution policies. Also, states attempting to attract new industry might be wary of getting an anti-industry reputation and, as a result, might be reluctant to demonstrate a willingness to enforce strict anti-pollution requirements. Thus, it would seem that the likelihood of adequate public enforcement may be significantly increased through the new amendments' approach of relying primarily on the federal government.

65. See note 33 *supra*.

66. 1970 Amendments § 304, 1970 U.S. CODE CONG. & AD. NEWS at 6947.

67. 1970 Amendments § 304(a)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6947.

68. 1970 Amendments § 304(a)(1), 1970 U.S. CODE CONG. & AD. NEWS at 6947.

69. 1970 Amendments § 304(a)(d), 1970 U.S. CODE CONG. & AD. NEWS at 6947-48.

70. 1970 Amendments § 304(b), 1970 U.S. CODE CONG. & AD. NEWS at 6948.

71. 1970 Amendments § 304(b)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6948.

72. 1970 Amendments § 304(b)(2), 1970 U.S. CODE CONG. & AD. NEWS at 6948.

submit an implementation plan may be possible. While the legislative design with respect to such plans obviously contemplates the issuance of regulations by the Administrator where a state fails to submit a proposal,<sup>73</sup> the language requiring such submission is mandatory,<sup>74</sup> with the result that such failure to act could be construed as a violation of a provision of the Act, subject to private civil suit. In addition, an action could be brought against any person who is allegedly in violation of an emission standard or limitation<sup>75</sup> or an order issued by the Administrator or a state with respect to such standards or limitations.<sup>76</sup> Similarly, a private litigant could bring an action to require the provision of information, making of reports, keeping of records, or the installation of monitoring equipment if such had been previously required by the Administrator.<sup>77</sup>

Since, as noted earlier, the Administrator has various options available to him in enforcing emission and performance standards and implementation plans,<sup>78</sup> it could be argued that the possibility of private civil enforcement actions in these areas would cause undue interference with his enforcement program and selection of options.<sup>79</sup> However, since the prospective private litigant must give the Administrator sixty days notice prior to commencing his action, it would seem that there would be ample opportunity for appropriate public action and that, therefore, any such disruption or interference would be de minimus. Furthermore, the object of an environmental suit is the enforcement of a public obligation; therefore, it would seem that members of the general public should be permitted to force compliance with anti-pollution requirements. Thus, it seems clear that the provision permitting private enforcement promotes the overall enforcement effort, and is theoretically sound and that the slight disruption of the Administrator's effort which might occur should be tolerated.<sup>80</sup>

73. 1970 Amendments § 110(c), 1970 U.S. CODE CONG. & AD. NEWS at 6917 states, in pertinent part, that:

The Administrator shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan . . . if

(1) the State fails to submit an implementation plan . . . within the time prescribed. . . .

74. 1970 Amendments § 110(a)(1), 1970 U.S. CODE CONG. & AD. NEWS at 6915 provides, in pertinent part, that:

Each state shall . . . adopt and submit to the Administrator . . . a plan which provides for the implementation, maintenance, and enforcement of [air quality] . . . standards. . . .

75. 1970 Amendments § 304(a)(1)(A), 1970 U.S. CODE CONG. & AD. NEWS at 6947.

76. 1970 Amendments § 304(a)(1)(B), 1970 U.S. CODE CONG. & AD. NEWS at 6947.

77. Only such records, reports, equipment, or information as the Administrator may reasonably require are mandatory. 1970 Amendments § 114, 1970 U.S. CODE CONG. & AD. NEWS at 6924-25.

78. See pp. 836-37 *supra*.

79. *Hearings, supra* note 31, pt. 5, at 1586-87. See also *Hearings, supra* note 31, pt. 4, at 1483.

80. While the problems of standing to sue faced by private litigants in the past will be eliminated in the air pollution area because standing has been granted to private litigants through the instant legislation, it will continue to be a major hurdle to private litigants in other areas of environmental litigation. Essentially, the liti-

In addition to the action against private persons, there are many possible actions in furtherance of his client's interests which an attorney could bring against the Administrator himself. It could be argued that, under the provision authorizing action to compel the Administrator to exercise his authority, an action might lie to restrict his election of enforcement options.<sup>81</sup> The authorization language, however, is restrictive enough that any action brought thereunder could only compel the exercise of authority, not the manner in which it is exercised.<sup>82</sup> Thus, it probably would not be possible, for example, to bring an action to force the Administrator to initiate criminal sanctions where he had already elected to proceed by administrative order to enjoin a knowing violation of a performance standard; whereas, it probably would be possible to bring such an action to require him to do one or the other.

All of these private enforcement actions could probably be brought as class actions pursuant to rule 23 of the Federal Rules of Civil Procedure.<sup>83</sup> The provision for citizen suits permits civil actions by any person. Since this does not specifically authorize class action suits, it could be argued that it was designed to preclude them. However, there is no language specifically excluding such actions, and the language quoted above is almost the same as that in Senator Muskie's original version of this section<sup>84</sup> which was unanimously viewed as permitting class actions.<sup>85</sup> Moreover, the language providing for citizen suits under the 1970 Amendments is identical to that found in the Clayton Act<sup>86</sup> which has long supported class actions.<sup>87</sup> In many cases it would be desirable to pursue such an action, rather than a single or joint party suit, in order to enlarge the geographic boundaries of the case to involve more polluters. Use of class actions increases the opportunity for publicity,

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gant's problem is one of showing an injury in fact to an interest sought to be vindicated which is arguably within the zone of interests intended to be protected by the statute sued under. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970). See also *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (1970); *Davis, The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

81. *Hearings*, *supra* note 31, pt. 5, at 1587.

82. 1970 Amendments § 304(a) (2), 1970 U.S. CODE CONG. & AD. NEWS at 6947, provides for such an action "where there is alleged a failure of the Administrator to perform any act or duty under this Act *which is not discretionary with the Administrator*" (emphasis added).

83. FED. R. CIV. P. 23.

84. S. 3546, 91st Cong., 2d Sess. § 13 (1970), provided for "civil actions brought by one or more persons on behalf of themselves or on behalf of any other persons similarly situated. . . ." While it could be argued that deletion of the last phrase supports a conclusion that no class action suits were intended, it is equally tenable that the purpose of such deletion was to permit conservation groups to sue more readily in regions in which they are not located. *Hearings*, *supra* note 31, pt. 2, at 853.

85. *Id.* at 622-23, 817.

86. 15 U.S.C. § 15 (1964) states, in pertinent part, that:

*Any person who shall be injured in his business . . . by reason of anything forbidden in the anti-trust laws may sue therefor. . . .* (emphasis added).

87. See, e.g., *Bascom Launder Corp. v. Telecoin Corp.*, 204 F.2d 331, *cert. denied*, 345 U.S. 994 (1953), which was a treble damage class action brought under the anti-trust laws by plaintiff operators of coin machines against defendant distributors of those machines.

which might make polluters more sensitive and responsive to public reaction. Thus, it is submitted that the availability of class actions will enhance the private anti-pollution effort.

Although the ability of private parties to play a major role in enforcing national air pollution policy is greatly enhanced under the new amendments, the ultimate level of participation has not been reached since there is no provision under which private litigants injured by air pollution can obtain damages from violators of federal standards.<sup>88</sup> It is submitted that such a provision should have been included in the amendments in order to provide a financial incentive for injured parties to take an active role in enforcing air pollution requirements and thus assure that the public enforcement effort is being reinforced by private action.<sup>89</sup> In the absence of such an incentive, it is possible that the extent of private enforcement activity will be unduly limited and that the total enforcement effort will be adversely affected to such a degree that it will not significantly deter polluters. Moreover, the ability of private litigants to attack polluters' pocketbooks would have a significant deterrent effect upon future violations. Furthermore, the greater reliance on private enforcement embodied in permitting damage actions would not be a new phenomenon in the law, because the federal government has so relied for some time in both the antitrust and securities fraud areas.<sup>90</sup> Thus, it seems that permitting damage actions would make effective enforcement of pollution requirements more likely and bring pollution enforcement policy into line with the enforcement policies in other areas of the law.<sup>91</sup>

88. 1970 Amendments § 304(a), 1970 U.S. CODE CONG. & AD. NEWS at 6947, provides that "[t]he district courts shall have jurisdiction . . . to enforce (the requirement sued under). . . ." An argument could thus be made that a court would be free to award damages if it deemed them necessary to enforce the questioned requirement. However, the absence of provisions specifying burden of proof requirements, which would be necessary in a damage provision, would seem to indicate that such actions were not contemplated. Moreover, the initial citizen suit proposal made no provision for damage actions, and most environmental attorneys testifying on that proposal assumed damage actions were not contemplated and argued that they should be added. See, e.g., S. 3546, 91st Cong., 2d Sess. § 13 (1970); *Hearings, supra* note 31, pt. 2, at 621-24, 816-40, 846-53. These arguments were deemed necessary despite the fact that S. 3546 permitted actions seeking "any . . . appropriate order" and that, therefore, an argument could have been made that a court was free to order payment of damages should it deem such an order appropriate.

89. It could be argued that such an incentive as well as an opportunity to receive compensation for injuries, is available through common law legal remedies. However, the cost and proof problems normally encountered in pursuing such remedies are such that compensation is seldom received; therefore, it would seem that the common law does not solve the problem. See generally Comment, *The Use of Private Action to Control Environmental Pollution in Pennsylvania*, 16 VILL. L. REV. 920 (1971).

90. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) (securities fraud case wherein private cause of action for damages read into proxy rules); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (antitrust case wherein defense of *in pari delicto* denied on grounds that the availability of private suit was necessary for full realization of the purposes of the anti-trust laws).

91. Any such provision should require a jury trial, and it should provide for a prima facie case which, when established, would entitle plaintiff to recover for all injuries, unless the defendant could show that he should not be held liable or that the extent to which he should be held liable is less than the amount necessary to compensate for all injuries. In establishing his prima facie case, plaintiff should be re-



## III. WATER POLLUTION

As in the case of air pollution, the federal legislature has established a broad policy for the prevention and control of water pollution. It will be shown in the following analysis of the most important water pollution legislation that the private citizen and his attorney have less opportunity to affect the formulation and enforcement of water pollution control requirements than is the case with air pollution control requirements. It will also be shown that more reliance is placed on the states with respect to the establishment and enforcement of water pollution requirements than is true with air pollution.

A. *The Water Pollution Control Act*<sup>92</sup>1. *Establishing Water Quality Standards*

The Federal Water Quality Act of 1965<sup>93</sup> provides for the establishment of national water quality standards for interstate waters.<sup>94</sup> The standards, together with a plan for the implementation and maintenance thereof, were to be established by the states after public hearings and before 1967.<sup>95</sup> If the standards and plans so established protected the public health or welfare and enhanced the water quality, they were to be the enforceable federal standards applicable to interstate waters with respect to which they were originally adopted.<sup>96</sup> To date, all fifty states have established water quality standards and implementation plans which

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quired to show, by a preponderance of the evidence, that he was injured, that the injury was caused by air pollution generally or a particular pollutant, and that defendant had contributed to a violation of federal air quality standards or had personally violated the federal emission standards applicable to the pollutant in question. See *Hearings*, *supra* note 31, pt. 2, at 816-23, 828-40. Thus, the difficult problem of showing the extent to which defendant's pollution caused the injury would no longer confront a plaintiff and much of the cost heretofore inhibiting action against polluters would be eliminated. See Comment, *supra* note 89, at 938-42. However, the cost of establishing that an injury was caused by pollution and that defendant violated federal requirements could be prohibitive. In order to alleviate this problem, the statute should provide for the discoverability and admissibility of any reports, records, information, or any results of private monitoring in defendant's possession, regardless of whether he obtained it as a result of his own initiative or as a result of the Administrator having required it. Such evidence would be relevant to the question of whether defendant had violated federal requirements. Also, the statute should provide for the discoverability and admissibility of any data regarding the physical effects of pollution generally or particular pollutants which might be accumulated and possessed by either the defendant or the Administrator. Such information should be probative on the issue of whether plaintiff's injury was caused by the alleged pollution. *Hearings*, *supra* note 3, pt. 2, at 828-40. The inclusion of the latter two requirements would substantially lessen the cost problems facing prospective plaintiffs.

92. 33 U.S.C.A. §§ 1151 *et seq.* (1970).

93. 33 U.S.C. §§ 466 *et seq.* (1964), *as amended*, 33 U.S.C.A. §§ 1151 *et seq.* (1970).

94. 33 U.S.C.A. § 1160 (1970).

95. 33 U.S.C.A. § 1160(c)(1) (1970).

96. 33 U.S.C.A. §§ 1160(c)(1), (3) (1970). At the minimum, no standards permitting the discharge of untreated waste which is amenable to treatment making it less destructive or failing to require all wastes to receive the best practical treatment could attain the required approval. Hines, *Controlling Industrial Water Pollution: Color the Problem Green*, 9 B.C. IND. & COM. L. REV. 553, 573-74 (1968).

have been either approved or partially approved.<sup>97</sup> With respect to those states having only partially approved standards, the Environmental Protection Agency Administrator has the authority in the event of a state's failure to act, to establish appropriate standards himself after: (1) giving notice that a conference will be held for that purpose; (2) a conference has been conducted; (3) his proposals have been published; and (4) a state has been given six months from the date of publication in which to adopt his proposals.<sup>98</sup>

Examination of the foregoing statutory provisions indicates that primary reliance is placed upon the states to establish water quality standards. The federal government performs a supervisory role to assure that state-established standards are in compliance with national minimums. While many states have been slow to establish standards fully acceptable to the federal authorities,<sup>99</sup> and, an argument can be made that they should not be so heavily relied upon for this reason, there is no indication that the propensity in this direction is such that there is a danger that inappropriate standards will finally result.<sup>100</sup> Thus, it would appear that, as is the case with the procedure for adopting plans for the implementation of air quality standards, the legislation has reached the optimum level of federal-state cooperation in the establishment of water quality standards.

## 2. *Enforcing Water Quality Standards*

The power to enforce against violations of water quality standards is vested in the Administrator.<sup>101</sup> Discharges which reduce interstate water quality below adopted standards and those which endanger the health or welfare of persons in states other than the one from which they emanate — interstate pollution — will result in the initiation of the enforcement process by the Administrator if he discovers the pollution

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97. The standards for Pennsylvania have been fully approved. ENVIRONMENTAL PROTECTION AGENCY WATER QUALITY OFFICE, THE ENVIRONMENTAL PROTECTION AGENCY, THE ENFORCEMENT ASPECTS OF THE FEDERAL WATER POLLUTION CONTROL PROGRAM AND THE PRE-EMPTION DOCTRINE 21, January 14, 1971 (unpublished papers presented to the Pennsylvania Law Enforcement Workshop) (Hershey, Pa., Jan. 13-14, 1971) [hereinafter referred to as WORKSHOP PAPERS].

98. 33 U.S.C.A. § 1160(c)(2) (1970). See also WORKSHOP PAPERS, *supra* note 97, at 20. The statute vests this authority in the Secretary of Interior; however, his functions in administering the Water Pollution Control Act have been transferred to the Administrator of the newly created Environmental Protection Agency or an officer designated by him. REORGANIZATION PLAN No. 3 OF 1970, §§ 2(a)(1), (3), 1970 U.S. CODE CONG. & AD. NEWS at 2997. See also H.R. REP. No. 1464, 91st Cong., 2d Sess. (1970). This plan, effective in December 1970, also undertakes to reorganize a myriad of other environmental functions undertaken by the government. *Id.*

99. Only twenty-eight states have established standards which were fully approved. WORKSHOP PAPERS, *supra* note 97, at 21.

100. While many states' standards have not been fully approved, all fifty states have standards approved wholly or in part. *Id.*

101. The Administrator has this power by virtue of the transfer of functions made to the Environmental Protection Agency. See REORGANIZATION PLAN No. 3 OF 1970, § 2(a)(1), *supra* note 98, at 2997.

as a result of reports, studies, or survey or if a state governor, water pollution control agency, or municipality requests such action.<sup>102</sup> In the case of intrastate pollution, such initiation will occur only upon request of the state governor that the Administrator act to secure the abatement of discharges sufficiently affecting the legitimate use of the polluted waters.<sup>103</sup>

The initial step in the enforcement procedure is a conference between the federal government and state and interstate water pollution agencies at which the occurrence of pollution violations, the adequacy of ongoing abatement measures, and the delays encountered in the abatement process are examined, and a schedule of required remedial measures is agreed upon<sup>104</sup> and recommended to the state. After a period of at least six months during which the state has an opportunity to force the necessary remedial action, the Administrator is required, after prior notice, to call a public hearing at which all the alleged polluters, state and interstate agencies, and persons affected by the pollution are to be given an opportunity to testify.<sup>105</sup> After hearing this testimony, the Hearing Board must make factual findings<sup>106</sup> and recommend necessary abatement measures to the Administrator who in turn, forwards them to the alleged polluters together with a notice specifying a reasonable time, not less than six months, during which abatement of the pollution is to be secured.<sup>107</sup> In the case of interstate pollution, if remedial action is not forthcoming, court action, instituted by the Attorney General, may be requested by the Administrator.<sup>108</sup> However, in the case of intrastate pollution, the written consent of the state governor is necessary in order for the Attorney General to proceed with such an action.<sup>109</sup>

Thus, public enforcement, exclusive of all other actions, is the watchword in federal water pollution law, and primary reliance is placed on state and interstate agencies for such action. This reliance may be ill-conceived if it is true, as has been charged, that state enforcement has, in the past, shown questionable effectiveness,<sup>110</sup> and that the policy of in-

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102. 33 U.S.C.A. §§ 1160(c)(5), (d)(1) (1970).

103. 33 U.S.C.A. § 1160(d)(1) (1970). For a discussion of the limitation that the Administrator has increased power only in cases of interstate pollution, see Dunkelberger, *The Federal Government's Role in Regulating Water Pollution Under the Federal Water Quality Act of 1965*, 3 NAT. RESOURCES LAW. 3, 12-14 (1970).

104. 33 U.S.C.A. §§ 1160(d), (e) (1970).

105. 33 U.S.C.A. § 1160(f)(1) (1970).

106. These findings will determine whether pollution endangering the health or welfare of persons is occurring and whether effective progress is being made toward its abatement. 33 U.S.C.A. § 1160(f)(1) (1970).

107. 33 U.S.C.A. § 1160(f)(1) (1970).

108. 33 U.S.C.A. § 1160(g)(1) (1970).

109. 33 U.S.C.A. § 1160(g)(2) (1970). For an outline of these enforcement provisions, see Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970).

110. See Hines, *supra* note 96, at 570, wherein it is stated:

[T]he 1965 and 1966 federal acts clearly express a congressional judgment that the states were doing little, too slowly, in the abatement of pollution. . . . [T]he dissatisfaction with the results of state abatement efforts was tactfully expressed

terstate agencies has generally been one of non-enforcement.<sup>111</sup> The reliance on local enforcement, therefore, only serves to delay the point at which federal involvement begins with the result that few federal court abatement actions have been instituted.<sup>112</sup> However, even if federal action were assured at an earlier point, effective enforcement would not be assured because funding and personnel limitations would impede successful administrative action.<sup>113</sup> In situations in which such action was taken and a suit by the Attorney General was ultimately instituted, enforcement might still be ineffectual because the court would be free to refuse to issue an abatement order if it found abatement economically impractical or unfeasible.<sup>114</sup> Furthermore, the burden of proof in such an action might be insurmountable because of the unavailability of pollution data and the difficulty of showing both illegal pollution and a reasonable abatement method.<sup>115</sup> Under these circumstances, the only course of action available to a private attorney to enforce water quality standards would be to inform the appropriate public officials of the violations about which his clients are concerned and follow the enforcement process, if it is initiated, in the hope of pressuring officials to act in the public interest and of having an opportunity to present evidence at public hearings or subsequent court actions. In the course of so doing, he should counsel his client that, in view of the aforementioned impediments to adequate enforcement, there is little reason, if any, to be optimistic about the prospects of federal water pollution requirements being adequately enforced as a result of his actions. It is strongly suggested, therefore, that a private right of action to enforce water quality standards be established by Congress. Indeed, the lack of this right seems discriminatory in light of

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through the announcement of a national policy to enhance water quality. In order to spur the tempo of state pollution control, the Act requires nationwide water quality standards to be established.

The same factors which could lead to ineffectual state anti-pollution activity in the air pollution area would probably have the same influence in the field of water pollution. See note 64 *supra* and accompanying text.

111. The following organizations have the authority to issue abatement orders and to pursue court enforcement thereof: (1) the Ohio River Basin Sanitation Commission, including Pennsylvania, Ohio, West Virginia, and Kentucky, pursuant to the Ohio River Valley Water Sanitation Compact, Art. IV, 54 Stat. 752 (1940); (2) the Delaware Basin Commission, including Delaware, Pennsylvania and New Jersey, pursuant to the Delaware River Basin Compact, Art. 2, § 2.1, 75 Stat. 691 (1961); and (3) the Interstate Sanitation Commission, pursuant to the Tri-State Compact, Art. IV, 49 Stat. 932 (1935). While some compliance orders have been issued pursuant to this authority, only the Interstate Sanitation Commission has pursued a successful court action. See E. CLEARY, *THE ORSANCO STORY* 117-22 (1967).

112. In the early years of water pollution legislation only one action for abatement was instituted. See *Hearings on the Activities of the Federal Water Pollution Control Administration and Water Quality Standards Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 674 (1967).

113. See generally Hines, *supra* note 96.

114. 33 U.S.C.A. § 1160(h) (1970), requires that the court give "due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved. . . ."

115. See Barry, *supra* note 109, at 1120.

the fact that individuals adversely affected by air pollution are granted this right, but those comparably affected by water pollution are denied it.

### B. *The Refuse Act of 1899*<sup>116</sup>

The Refuse Act is essentially a criminal statute making it unlawful to discharge any kind of refuse matter, except that which flows in liquid form from streets and sewers, into any navigable waterway or tributary thereof or onto banks of such waterways without a permit from the United States Army Corps of Engineers.<sup>117</sup> Violations of the act are, upon request of the Corps of Engineers, subject to criminal prosecution by the Attorney General and penalties of a fine not exceeding \$2,500 nor less than \$500 or penalties of imprisonment for not less than thirty days nor more than one year or both.<sup>118</sup> At first glance, this would seem to give the federal government extensive control over refuse discharge and effective weapons with which to enforce that control. However, the Corps has not established adequate procedures through which to exercise the permit authority granted it,<sup>119</sup> and the Attorney General's office has taken the position that it would not be appropriate to bring actions to secure the criminal sanctions against violators of the Act.<sup>120</sup> While it could be argued that the Attorney General's posture is justified because the federal government has enacted a whole new scheme for controlling water pollution since the enactment of the Refuse Act, this argument is not persuasive because within that scheme the Refuse Act's permit requirement is recognized and supplemented by a requirement that, prior to receiving a permit, the applicant obtain state certification that the manner of discharge will not violate applicable water quality standards.<sup>121</sup> Thus, it would seem that proper enforcement of the Refuse Act is essential to, rather than in conflict with, the newer federal water pollution abatement program.

Despite the general non-enforcement attitude, some important cases establishing a right to injunctive relief under the Act have been decided.<sup>122</sup>

116. 33 U.S.C.A. §§ 407, 411, 413 (1970).

117. 33 U.S.C.A. § 407 (1970).

118. 33 U.S.C.A. § 411 (1970).

119. *See generally* CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. NO. 917, 91st Cong., 2d Sess. (1970). While there have been recent attempts to correct this shortcoming, apparently no recognizable procedure has yet been implemented. Exec. Order No. 11,574, WORKSHOP PAPERS, *supra* note 97, at 15.

120. STAFF OF CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 91st Cong., 2d Sess., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATIONS WATERWAYS 10 (Comm. Print 1970). This posture has been taken, executive orders by the President to the contrary notwithstanding. Exec. Order No. 11,574, § 2(b); WORKSHOP PAPERS, *supra* note 97, at 16.

121. 33 U.S.C.A. § 1171(b)(1) (1964).

122. *See, e.g.,* United States v. Republic Steel Corp., 362 U.S. 482 (1960); Sanitary Dist. v. United States, 266 U.S. 405 (1925). *Compare* United States v. Republic Steel Corp., 286 F.2d 875 (7th Cir. 1961), with United States v. Bigan, 274 F.2d 729 (3d Cir. 1960).

The availability of such relief significantly bolsters the strengths of the Act as a device for attacking water pollution because, even if criminal sanctions were vigorously sought, they alone would not assure the discontinuance of the attacked evil. Thus, the government's failure to fully administer and enforce an Act with such potential is obviously reprehensible, and the need for private enforcement through citizen suits is pointedly indicated.

### 1. *Citizen Suits under the Refuse Act*

In addition to providing heavy fines against violators, the Refuse Act provides that "[o]ne half of said fine [shall be] paid to the person or persons giving information which shall lead to conviction. . . ."<sup>123</sup> This provision buttresses the ability of public officials to enforce the Act by providing a monetary incentive to citizens who furnish information concerning violations. A question arises, however, as to whether such informers are required to depend on public enforcement for the collection of their bounty or whether they are free, in the event of the government's failure to enforce, to sue the violators directly in order to receive it. Such a suit would be brought as a *qui tam* action.<sup>124</sup>

*Qui tam* private enforcement actions were first specifically permitted by statute in England. They developed as a response to the absence of adequate professional police forces and Parliament's lack of confidence in the Crown's intentions to enforce the law.<sup>125</sup> Both of these factors have been of importance in the United States, with the result that actions by private informers pursuant to statutes explicitly providing therefor have long been permitted in this country.<sup>126</sup> However, the Refuse Act does not specifically authorize such action, and an argument could be made that the absence of specific authorization indicates an intent not to permit them. On the other hand, the statute does not specifically deny this remedy, and there is authority to the effect that *qui tam* actions are authorized by statutes providing for informer rewards but which neither specifically authorize nor deny the informer the right to bring such

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123. 33 U.S.C. § 411 (1964).

124. A *qui tam* action is a civil suit brought by a citizen to collect a fine, penalty, or forfeiture of a share to which he is entitled under the statute imposing the penalty. The citizen must describe himself as suing for the government as well as for himself. Such actions have their origins in the so-called popular actions as private attorney generals in England. See 3 W. BLACKSTONE, COMMENTARIES \* 60; 3 H. STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 535-36 (1884). See also STAFF OF CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, *supra* note 120, at 2.

125. STAFF OF CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, *supra* note 120, at 2.

126. See, e.g., United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943); Marvin v. Trout, 199 U.S. 212, 225 (1905). The following statutory provisions explicitly permit *qui tam* actions by common informers. 19 U.S.C. § 1619 (1964); 31 U.S.C. §§ 163, 231-33, 1003 (1964); 46 U.S.C. §§ 1351-54 (1964); 25 U.S.C. § 201 (1964).

actions.<sup>127</sup> Indeed, much of the statutory language upon which the citizen suits permitted to date have been based is strikingly similar to that appearing in the Refuse Act.<sup>128</sup> It would thus seem that *qui tam* actions could be brought to enforce the Refuse Act.

The argument could also be made, however, that such private actions are precluded because the Refuse Act specifically requires United States Attorneys to prosecute violations<sup>129</sup> or, in the alternative, that, assuming such actions are not precluded, reliance on United States Attorneys gives them a right to control any private suits brought under the Act. Since *qui tam* actions are partially for the benefit of the Government, it would seem that government attorneys should have some influence over their conduct. Yet, the actions are also brought for the benefit of the private litigants who instituted the suit. Thus, it would appear that *qui tam* actions under the Refuse Act are not precluded by the statutory provisions granting enforcement power to United States Attorneys and that they should not be subject to the full control of such attorneys.<sup>130</sup>

The private attorney seeking to prosecute violators of the Refuse Act may be able to do so by use of the *qui tam* action. Such actions should not be brought lightly, however, because their cost could be quite prohibitive if difficulty is encountered in instituting or proving the case. The pre-litigation requirements themselves might make an action too

127. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1947), the Court stated that:

[S]tatutes providing for a reward to informers which do not specifically authorize or forbid the informer to institute the [*qui tam*] action are construed to authorize him to sue. . . .

*Id.* at 541 n.4. See also *Adams v. Woods*, 6 U.S. (2 Cranch) 335 (1805); *United States v. Stocking*, 87 F. 857 (D. Mont. 1898); *United States v. Laescki*, 29 F. 699 (N.D. Ill. 1887). But see *Omaha & R.V. Ry. v. Hale*, 45 Neb. 418, 63 N.W. 849 (1895); *O'Kelly v. Athens Mfg. Co.*, 36 Ga. 51, 135 S.E. 112 (1876); *Smith v. Look*, 108 Mass. 139 (1871).

128. The statute construed in *United States v. Laescki*, 29 F. 699 (N.D. Ill. 1887), stated that:

Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer.

*Id.* The language in the statute under which action was brought in *United States v. Stocking*, 87 F. 857 (D. Mont. 1898), was as follows:

[A]ll penalties . . . shall be sued for and recovered . . . in the name of the United States . . . one-half to the use of the informer, and the other half to the use of the United States. . . .

*Id.* at 859. In *Adams v. Woods*, 6 U.S. (2 Cranch) 335, the statutory language required all violators to:

forfeit and pay the sum of two-thousand dollars; one moiety thereof to the use of the United States . . . and the other moiety thereof to the use of him or her who shall sue for and prosecute the same.

*Id.* Only the latter could be construed as explicitly authorizing a *qui tam* action. 129. 33 U.S.C.A. § 413 (1970).

130. This conclusion finds support in the case of *United States v. Griswold*, 26 F. Cas. 42 (No. 15,266) (D. Ore. 1877), in which it was stated that:

[T]he fact that the district attorney is required to be diligent to enforce the statute . . . [does not] make him the attorney of the United States in this [*qui tam*] action. . . . Neither does the provision . . . which makes it the duty of the "district attorney to prosecute . . . all civil actions in which the United States are concerned," authorize or require him to act as attorney for the plaintiff in this [*qui tam*] action. . . .

*Id.* at 44. See generally STAFF OF CONSERVATION AND NATURAL RESOURCES SUBCOMM. OF THE HOUSE ON GOVERNMENT OPERATIONS, *supra* note 120, at 23-26.

costly. It would first be necessary to determine whether the discharge in question was authorized by a Corps of Engineers permit and if that permit was issued validly after the polluters received certification that the discharge would not decrease water quality below applicable federal standards. If a valid permit had been issued, it would be necessary to determine whether the polluter is complying with its terms. The terms of the permit should be readily obtainable from the appropriate Corps of Engineers office.<sup>131</sup> If it is determined that no permit had been issued or that the terms of an issued permit are being violated, it is necessary to provide the United States Attorney with information sufficient to lead to a conviction.<sup>132</sup> It is not clear exactly what information would be required in order to lead to a conviction, but it would seem that the following information should be provided: (1) a statement that a violative discharge is taking place; (2) the location, name, and address of the violator; (3) the name of the waterway involved; (4) the names and addresses of persons who know of, and could testify about, the discharge; and (5) the date, or dates, on which the violative discharge occurred. In addition, it would probably be helpful to forward facts concerning the method of discharge and the status of the waterway as a navigable one, or tributary thereof, and, whenever possible, photographs of the discharges and samples of the pollutants should be included. If the latter may be obtained, the conditions under which samples are taken should be documented. In approaching the decision as to whether to initiate a *qui tam* action, it should also be kept in mind that, should the claimant fail to prove a violation by a preponderance of the evidence and thus lose the case, he may be required to pay all costs. Such costs could be substantial in these actions since they involve many highly technical fact questions. Hence, it is submitted that the *qui tam* action should be initiated only in situations in which the chances of conviction are high.<sup>133</sup>

#### IV. CONCLUSION

The greatest shortcoming in modern federal air and water pollution legislation is its failure to permit individuals to participate fully in enforcing the various requirements. While the 1970 federal air pollution amendments significantly increase citizens' power in this regard, they fail to assure a full frontal attack on the problem because they fail to include a private right to damages based on violations of federal requirements.<sup>134</sup> It is submitted that such a provision should have been included

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131. It is required that such information be made available to the public. 42 U.S.C. § 4332 (Supp. V, 1970).

132. This is a prerequisite to an informer's right to one-half of the fine. 33 U.S.C.A. § 411 (1970).

133. Should one be brought, the appropriate tribunal would be a federal district court. 28 U.S.C. § 1355 (1964).

134. See p. 841 *supra*.



in order to assure broad participation in private enforcement. In the water pollution area the shortcomings in this regard are even greater because the controlling legislation contains no provision granting even the minimal citizen enforcement capability permitted in the air pollution legislation.<sup>135</sup> While there is apparently some citizen enforcement opportunity available through *qui tam* actions brought under older legislation,<sup>136</sup> this could be so costly that the practical opportunities available for its use are limited. Thus, it is submitted that citizen enforcement capabilities should be expanded beyond present levels in both air and water pollution legislation.

With respect to federal-state cooperation in the fight to control air and water pollution, it would appear that optimum levels have been reached with respect to the establishment of federal requirements.<sup>137</sup> However, with respect to the enforcement of these requirements by the public sector, there is too much reliance on state agencies in the water pollution area. This shortcoming has been alleviated in the air pollution area by increasing federal power, and it is submitted that this approach should be adopted in the water area as well. Should this be achieved, it is submitted that the public enforcement effort will be enhanced and there will be a substantial increase in the realization of federal water pollution policy.

*Thomas R. Hendershot*

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135. See pp. 844-46 *supra*.

136. See pp. 847-49 *supra*.

137. See pp. 832, 843 *supra*.